passenger, *a fortiori* ought it to be liable when he assaults a passenger, even though he may[13] be under no individual liability in either case.

There remains the question whether the plaintiff's conduct in provoking the insult should be considered in mitigation of compensatory damages. The courts are divided where an insult by the plaintiff provokes the assault by the servant of the defendant company.[14] On the one hand, it is urged that the plaintiff, having brought the injury upon himself, should not recover full damages therefor; on the other, that to allow such mitigation may in effect make provocation a justification, since it enables the jury to give only nominal damages. Regardless of whether or not mitigation should be allowed in actions between individuals,[15] the true view seems to be that the vital interest of the public forbids its application in suits against public service companies.[16]

RECENT CASES.

ADVERSE POSSESSION — SUBJECT MATTER AND EXTENT OF ADVERSE POSSESSION — MINERALS: SEVERANCE FROM SURFACE BY DEED: GRANTEE OF ADVERSE POSSESSOR HOLDING POSSESSION FOR HIS GRANTOR. — The plaintiff's grantor took possession of certain land without any paper title and held it adversely for seven years. He then conveyed the surface of the land to X., reserving the minerals; and X. and his grantees entering held possession of the surface for the remainder of the statutory period, no one meanwhile operating the mines. Thereafter the plaintiff bought the minerals from the grantor, and brings this bill to quiet his title to them. *Held*, that the plaintiff is entitled to the relief sought. *Moore* v. *Empire Land Co.*, 61 So. 940 (Ala).

The court decides that while the conveyance of the surface reserving the minerals actually worked a severance of the mineral and surface rights as between grantor and grantee, nevertheless as regards all outsiders the possession of the surface by the grantee is also a possession of the minerals. This possession of the minerals, however, the grantee holds for his grantor, and at the end of the statutory period the grantor, though not in actual possession himself, has obtained a good title to the mineral rights by adverse possession. Hence on this reasoning it follows that a purchaser from him should be permitted to quiet title to the minerals. In a similar Alabama case it was held conversely that adverse possession of the surface by a grantor was also a possession of the minerals for the benefit of his grantee of the minerals. *Black Warrior Coal Co.* v. *West*, 170 Ala. 346, 54 So. 200, see 24 HARV. L. REV. 582, for an editorial comment on this case.

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[13] The word "may" is used advisedly. It is possible that in time the employees of a public service company will themselves be regarded as public servants. This doctrine, however, is yet in its incipiency.

[14] That it should — Houston, etc. R. Co. *v.* Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981; that it should not — Mahoning Valley Ry. Co. *v.* De Pascale, 70 Ohio St. 179, 71 N. W. 633. That it should mitigate exemplary damages, all courts agree. This is satisfactory, since the awarding of such damages against a corporation whose proper officers have not ordered the acts complained of, is anomalous, in that it punishes a personally innocent defendant. See SEDGWICK, DAMAGES, 9 ed., § 380.

[15] The general rule seems to allow mitigation if the insult is recent. Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. 1128. See Le Laurin *v.* Murray, 75 Ark. 232, 238, 87 S. W. 131, 133. *Contra*, Goldsmith's Adm'r *v.* Joy, 61 Vt. 488, 17 Atl. 1010.

[16] The analogy referred to in note 10, *supra*, is applicable here also.

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — LIABILITY OF GRATUITOUS AGENT FOR NON-FEASANCE. — The defendant, at the plaintiff's request, undertook gratuitously to procure the immediate cancellation of an insurance policy issued by the plaintiff. The defendant directed its local correspondent to investigate the risk with a view to action in the future. The policy remained outstanding, and the plaintiff was obliged to indemnify for a loss. *Held*, that the defendant is liable in tort. *Condon* v. *Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548 (City Court of New York).

For a discussion of the liability of a gratuitous agent for non-feasance, see p. 167 of this issue of the REVIEW.

AGENCY — PRINCIPAL'S RIGHTS AGAINST THIRD PERSONS IN CONTRACTS — EFFECT OF RECEIPT OF USURIOUS COMMISSION BY AGENT. — The plaintiff intrusted $400 to his agent to loan. The agent loaned $350 to the defendant, taking the latter's note for the sum with legal interest, and exacting besides a $50 commission for himself. The principal knew nothing of the commission, nor derived any benefit from it. In a suit on the note, the defendant sets up usury. *Held*, the principal can recover, for in exacting the bonus the agent was not acting within his authority. *Brown* v. *Johnson*, 134 Pac. 590.

The result is not altogether free from difficulties, although in line with the weight of the authorities. *Condit* v. *Baldwin*, 21 N. Y. 219; *Call* v. *Palmer*, 116 U. S. 98. The problem arises whether the transaction is one agreement or two distinct agreements. Now where the principal, or the agent acting within his authority, makes the contract, or where the principal is undisclosed, there is one agreement, and the whole is tainted by usury. *Hall* v. *Maudlin*, 58 Minn. 137, 59 N. W. 985; *Erickson* v. *Bell*, 53 Ia. 627, 6 N. W. 19. So it may be argued the contract is an entirety here. *Security Co.* v. *Hendrickson*, 13 Neb. 157, 12 N. W. 916. See *Condit* v. *Baldwin*, *supra*, 229. If so, the contract is the principal's, and since it is unenforceable for usury, even the sum lent cannot be recovered. *Security Co.* v. *Hendrickson*, *supra*. Or better, the contract fails entirely, not on account of the usury, but because the agent exceeded his authority in making it. See *Bell* v. *Day*, 32 N. Y. 165, 183; *Condit* v. *Baldwin*, *supra*, 230. The principal, under the last construction, should recover his money in an action for money had and received. See *Bell* v. *Day*, *supra*, 179, 183; *Condit* v. *Baldwin*, *supra*, 230. This latter view seems the best practical solution. But as a matter of fact it seems there are two agreements. *Condit* v. *Baldwin*, *supra*. That was the intention of the parties. So the principal case appears logically correct in allowing a recovery on the good contract. Nor is there any difficulty with the consideration, for the loan was paid. No doubt if the principal had received the bonus from the agent, he would be barred on account of his participation in the illegality. *Bliven* v. *Lydecker*, 130 N. Y. 102.

ASSAULT AND BATTERY — CRIMINAL RESPONSIBILITY — SPECIFIC INTENT OF DEFENDANTS ENGAGED IN COMMON ENTERPRISE. — While the defendants were endeavoring to escape apprehension for poaching, one of them shot a gamekeeper. On an indictment for shooting *with intent to murder*, the court charged that both would be guilty if there had been any arrangement between them to resist capture at all costs, or if the nature of the enterprise was such that both must have realized that resistance at all costs was likely to happen. *Held*, that the instructions were correct. *Rex* v. *Pridmore*, 77 J. P. 339 (C. C. A.).

All who embark upon a common unlawful enterprise are responsible for the intended results of their adventure, since each of them is equally a proximate cause of the other's acts. *Rex* v. *Whithorne*, 3 C. & P. 394; *Ferguson* v. *State*, 32 Ga. 658. Even if the results are not intended, no break in the causation relieves the confederates from responsibility so long as the results are foreseeable